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Tribute to the Honorable Rex E. Lee Solicitor General of the United States 1981-85

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THOMAS REX LEE*

On more than one occasion over the past few years I have wished that I could talk to the man who is honored in these pages to ask for his advice in preparing a case for oral argument on appeal. Rex Lee served as Solicitor General of the United States, headed up Sidley & Austin's enormously successful appellate litigation practice, and argued fifty-nine cases in the Supreme Court and many cases in other appellate forums. He was also my dad, and I have often longed to ask for his counsel as I prepare my cases for appeal.

To some extent, I can imagine the conversation that we would have. I attended more than a few of his Supreme Court arguments, including a couple during the early years of my own legal career. In the days leading up to his argument in *O'Melveny & Myers v. FDIC*,¹ I was with him literally around the clock, and had the opportunity to participate in his final preparation for that case and to talk about his views on oral advocacy.

As I think back on these memories, I am reminded of many of the attributes that brought him so much success as an oral advocate, and I can imagine him pointing to some of the basic principles that he lived by. During one of our conversations about oral advocacy, I remember him drawing an analogy between oral argument and a conversation about an important topic with a friend—not just any friend, but one that is respected and looked up to.² When this model is followed, he explained, an advocate's persuasiveness is enhanced because he naturally incorporates some basic guidelines of oral advocacy—to

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1. 512 U.S. 79 (1994).

2. Others have made similar comments on the proper approach to oral advocacy. See William H. Rehnquist, *Oral Advocacy*, 27 S. Tex. L. Rev. 289, 297 (1986) (asserting that "the more you can keep your tone conversational, rather than oratory, the better your case will fare"); *id.* at 300 (suggesting that in a discussion between husband and wife as to "whether or not you should go to the mountains or the seashore for [a] vacation that year," you would never "read your arguments to your spouse," but would speak conversationally, recognizing that "tremendous advantage . . . comes from face-to-face eye contact in any effort at persuasion"); Joel F. Dubina, *Effective Appellate Advocacy*, 20 Litig. 3, 71 (Winter 1994) (encouraging the oral advocate to "[v]iew the oral argument before a federal appellate court as an enjoyable experience").

maintain eye contact,³ speak conversationally and candidly,⁴ and listen to and answer questions that are raised.⁵ These were some of the hallmarks of a Rex Lee argument, and undoubtedly he would have advised me to practice them as well.

When I learned that this journal planned a series of tributes to my dad, I hoped that they would provide some additional insight into the pointers that he might have offered if he were still around. The authors of the following tributes worked closely with him in a variety of professional settings, and their tributes promised to give further enlightenment into the insight I have longed for. At first glance, the tributes that follow might appear to have missed the mark (at least the one that I had envisioned). The anecdote and acclaim set forth in these pages focus primarily on Lee's personal qualities, and are mostly devoid of the sort of practice pointers that I had envisioned.

But in fact, it seems to me that the tributes that follow offer profound insights into the profile of an effective oral advocate. They offer a series of snapshots of Lee's life in a variety of contexts, and in so doing they confirm that he saw the guidelines set forth above not merely as rules for appellate argument, but as principles to live by.

Thus, the conception of oral argument as a conversation with a respected friend came easily to Rex Lee, not only because he had developed literal friendships with several of the Justices, but also because he had a sort of "gift" for friendship. As Reese Hansen's tribute puts it, he had an instinctive knack for "mak[ing] every person he met feel immediately that he or she had been brought into the inner circle of [his] closest personal

3. See William H. Rehnquist, *The Supreme Court: How It Was, How It Is* 297 (William Morrow & Co., Inc. 1987) ("The ultimate purpose of oral argument, from the point of view of the advocate, is to work his way into the judge's consciousness and make the judge think about the things that the advocate wishes him to think about. One of the best ways to begin this process is to establish eye contact with as many of the judges as possible, and this simply can't be done while you are reading your presentation.").

4. See *N.Y. Cent. R.R. v. Johnson*, 279 U.S. 310, 319 (1929) (opinion for the Court of Jackson, J.) ("remind[ing] counsel that the attempted presentation of cases . . . with want of fairness and candor discredits the bar and obstructs the administration of justice"); Dubina, *supra* note 2, at 4 (counseling the advocate to "be candid with the judges").

5. See John W. Davis, *The Argument of an Appeal*, 26 ABA J. 895, 897 (Dec. 1940) (advising, among other things, that the oral advocate should "[r]ejoice when the Court asks questions"); Dubina, *supra* n. 2, at 4 (encouraging the advocate to "answer the judges' questions directly and precisely" and not to "evade or muddle").

friends.”⁶ “That characteristic,” Hansen concludes, “made an enormous difference in bringing the initial faculty to the law school” that Lee helped to found.⁷

Rodney Smith’s tribute notes that Lee’s circle of friends had a wide radius. Although he “spent a good deal of energy during his service as Solicitor General in an effort to overturn *Roe v. Wade*,” the landmark abortion rights opinion authored by Justice Harry Blackmun, Smith notes that Lee and Blackmun developed a friendship born of mutual respect.⁸ There obviously were others on the Court with whom he was more naturally aligned ideologically (and he counted them as close friends, too), but Lee’s gift of developing friendships shined through most clearly when he made less natural alliances.

These alliances, however, were not developed with an ulterior eye toward gaining advantage in oral advocacy. Genuineness and charisma were simply innate attributes of Rex Lee. Carter Phillips’s tribute makes this point in attesting to Lee’s effectiveness in building coalitions among divergent teams of lawyers in complex cases on appeal. As Phillips puts it, Lee generated consensus as a “lawyer’s lawyer” not only because he was “the smartest, most experienced Supreme Court lawyer in America,” but also because he “just happened to be the nicest person as well.”⁹

In my experience, his genuineness was unwavering and indiscriminating. He was as at ease with the Justices of the Supreme Court as he was with the Arizona sawmillers he grew up with, and he seemed to me to have the same genuine interest in maintaining friendships with the latter as he was with the former. Throughout his life, he must have introduced me to hundreds of people who were identified as his closest friends, and after he passed away our family received condolences from at least as many who claimed the same relationship.

6. H. Reese Hansen, *A Tribute to the Honorable Rex E. Lee*, 3 J. App. Prac. & Process 574 (2001).

7. *Id.*

8. Rodney K. Smith, *A Tribute to the Honorable Rex E. Lee*, 3 J. App. Prac. & Process 580-81 (2001).

9. Carter G. Phillips, *A Tribute to the Honorable Rex E. Lee*, 3 J. App. Prac. & Process 568 (2001).

By the same token, candor and willingness to listen were not decrees that Rex Lee invoked at the appellate lectern and quashed at the courthouse door; they were fundamental tenets of life. Reese Hansen's tribute attests to this in recounting Lee's "management style" as the dean of a new law school—in recalling that Lee "was unabashedly open and candid" and that he "valued ideas and input from all sides of an argument."¹⁰ Rodney Smith's tribute confirms this characterization in his recollection of the law students' perception of their dean after he rejected their pleas for additional resources for a law journal: He recalls that Lee's willingness to "listen carefully" to their arguments left students satisfied that their "position had been understood and considered by one who valued justice and fairness."¹¹

Similarly, a consistent theme of Carter Phillips's tribute is that Lee's effectiveness as a "lawyer's lawyer" stemmed from his ability to listen. As Solicitor General, Phillips remembers, Lee was especially adept at managing "meetings involv[ing] agencies with conflicting views about the best way to resolve a particular issue or the best course to follow in litigation."¹² His success in this arena, according to Phillips, was due in large part to his willingness "to listen carefully, understand the arguments, ask probing questions, and ensure that everyone felt that he or she had been fully heard."¹³ In private practice, Phillips recalls that Lee was equally successful in building coalitions among large teams of lawyers with divergent views and stakes in complex cases.¹⁴ He concludes that Lee's effectiveness in this capacity stemmed in large measure from the fact that he "always respected other points of view and always took the time to explain why he favored a particular argument or preferred not to include an argument."¹⁵

In sum, the tributes that follow portray a complete profile of Rex Lee the oral advocate. They do so not *despite* their lack of consistent focus on his argument style, but perhaps *because* of

10. Hansen, *supra* n. 6.

11. Smith, *supra* n. 8 at 582-83.

12. Phillips, *supra* n. 9 at 565.

13. *Id.*

14. *Id.* at 566-67.

15. *Id.* at 567.

that approach. They underscore the fact that the most basic fundamentals of effective advocacy can and should be practiced outside the courtroom.¹⁶ In my view, Lee's genius as a Supreme Court advocate stemmed above all from the fact that he lived and breathed those fundamentals in all aspects of his life—so much so that the metaphor of an enjoyable conversation with a trusted friend was for him essentially a reality.

Indeed, like other great advocates, my dad approached oral argument not merely as a challenging hurdle that had to be cleared in the course of furthering his client's position, but as an experience that was to be savored and enjoyed for its own sake. The great Daniel Webster spoke of his experience in arguing the famous case of *Gibbons v. Ogden*¹⁷ in the following terms of endearment: "I think I never experienced more intellectual pleasure than in arguing that novel [case] to a great man [Chief Justice Marshall] who could appreciate it, and take it in."¹⁸ My father's feelings toward oral argument in the Supreme Court were similar. The following entry in his personal journal on November 5, 1990, the day of his argument in *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*,¹⁹ is indicative:

I am experiencing right now one of the most pleasing feelings and sensations available to any human being: complete relief and satisfaction. Feelings of this quality and magnitude for me come only in the wake of one particular experience: an oral argument in the Supreme Court in which everything goes just exactly right.²⁰

For Rex Lee, an argument in the Supreme Court was a singular experience that brought unique joy and satisfaction. But his effectiveness in that role was due in large part to the fact that he approached it with the same candor, zeal, and attitude that he carried with him in the various aspects of his life that are memorialized in the following pages.

16. Chief Justice Rehnquist made a similar point in a much more colorful way: "Oral advocacy is no great mystery. You don't even have to be a lawyer to get experience in oral advocacy—all you have to do is get married." Rehnquist, *supra* n. 2, at 290.

17. 22 U.S. 1 (1824).

18. Charles Warren, *The Supreme Court in United States History* vol. 1, 603 (Little, Brown & Co. 1926).

19. 498 U.S. 211 (1991).

20. Rex E. Lee, Unpublished Journal (on file with author).